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A Decade Makes Quite a Difference in eDiscovery

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On September 12, 2018, the United States District Court for the Middle District of Tennessee issued a new Administrative Order 174-1 (current AO) governing eDiscovery. This supplants an earlier administrative order, Administrative Order 174 (previous AO), that was entered on July 9, 2007. A comparison of the two AOs shows what a difference 11 years makes, and the changes reflect a more general change in the eDiscovery landscape.

The previous AO was entered just eight months after the 2006 amendments to the *Federal Rules of Civil Procedure* took effect. That was a watershed moment in eDiscovery, making it clear that electronically stored information (ESI) was discoverable and providing a framework for dealing with the realities of a rapidly evolving technological landscape.

The previous AO focused on bridging the gaps in lawyers' understanding of technology by requiring that the right people bring the right information to discussions to talk about the right things. It focused plainly on "relevant" information – a word used at least ten times in AO174 – but sought to encourage and facilitate meaningful dialogue between the parties, the involvement of the technical personnel, and an early focus on the challenges of eDiscovery in the course of litigation.

Because eDiscovery was such a recent development, the previous AO sought to demystify it. It required disclosures of the most relevant custodians and systems, along with context. In addition, because best practices were still evolving, it required that an eDiscovery "coordinator" be identified. This coordinator was to be familiar with the electronic systems of the party and have knowledge of the eDiscovery processes.

The *Federal Rules of Civil Procedure* again received major changes related to eDiscovery in December 2015. Most particularly, the definition of "relevant" was amended such that information must not only relate to the claims or defenses, but also must be "**proportional to the needs of the case**." This proportionality requirement has helped to address the growth and expansion of new technologies such as mobile devices, the explosion of social media, and the centrality of ESI in resolving disputes.

The current AO significantly clarifies the duties and obligations in the good faith discussions. While it maintains a limited obligation to reveal custodians and sources "likely to contain discoverable ESI," it makes the following key changes:

- It jettisons the "coordinator" role in favor of a broader obligation that the "parties … engage in ongoing meet-and-confer discussions on ESI and use [Attachment A] … to guide these discussions;"
- It includes, on Attachment A, the explicit requirement that the parties discuss "Proportionality and Costs" as part of the good faith discussions, including certain "cost-saving measures;"
- It makes clear that "[t]he producing party is in the best position to determine the methods and protocols appropriate for searching its own ESI" and "[t]he producing party is best situated to evaluate the methods and protocols appropriate for searching its own ESI;" and
- It expounds on the ability to apportion costs, listing various factors to be used "in determining whether any or all of eDiscovery costs should be borne by the requesting party."

As mentioned above, these changes mirror widespread changes in the eDiscovery landscape. As eDiscovery best practices have evolved, the need for specific eDiscovery coordinators has lessened, and the need for a clear focus on proportionality has continued to evolve. The changes to this one administrative order, coming a decade after the initial issuance, demonstrate how far we have come and the work that remains to be done.

Baker Donelson has an entire eDiscovery, Document Review and Investigation Services Team devoted to making sure that eDiscovery costs are right-sized to each individual matter. For questions on this administrative order or other matters related to eDiscovery, please contact Clinton Sanko or Tony Mendenhall.